Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

MORDECHAI GAL-OLIVER and
MARGARET GAL-OLIVER,
Petitioners,

v.

COUTTS BANK (SWITZERLAND) LTD.,
formerly known as COUTTS & CO. AG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Second Circuit Court of Appeals so far depart from the accepted and usual course of judicial conduct so as to call for the exercise of this Court's supervisory power to review the affirmance of the dismissal of Plaintiffs' claims on grounds that bear no relation to Plaintiffs' pleadings, to wit:

(i) Dismissing Plaintiffs' RICO claim on the grounds that the pleadings do not comply with the requirements of 18 U.S.C. § 1962(c) - when, in fact, Plaintiffs *pursued a claim solely under 18 U.S.C. § 1962(a)*;

(ii) Affirming the District Court's denial of leave to amend the Complaint on the grounds Plaintiffs had failed to request leave to amend in the District Court when, in fact, *leave had been requested and denied*;

(iii) Dismissing Plaintiffs' claims under the Securities Exchange Act of 1934 on the grounds that their claim was not "in connection with" the purchase or sale of securities, when, in fact, Plaintiffs asserted a classic claim that they were induced to purchase securities by misrepresentations as to its value;

(iv) Dismissing Plaintiffs' RICO and securities claims for failure to plead fraud with particularity while ignoring the detailed allegations of the Complaint and, instead, focusing on a single allegation *that did not form a basis of Plaintiffs' fraud claims*?

PARTIES TO THE PROCEEDING

Petitioners

Mordechai Gal-Oliver and Margaret Gal-Oliver are individuals and have no corporate affiliations.

Respondents

Coutts Bank (Switzerland) Ltd., formerly known as Coutts & Co. AG.

Coutts' parent is National Westminster Bank. Coutts has no non-wholly-owned subsidiaries.

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CITATION OF REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Second Circuit is reported at 193 F.3d 85 (2d Cir. 1999). A copy of the opinion is included as Appendix A at 1a - 8a.

The order denying petitioners' motion for reconsideration in the United States Court of Appeals for the Second Circuit is not included in an official reporter. It is included in Appendix D at 21a-22a.

The opinion of the United States District Court for the Southern District of New York is not included in an official reporter. It may be found at 1998 WL 526440 (8/21/98) or at RICO Bus. Disp.Guide 9589, and is included as Appendix B at 9a - 18a.. A copy of the Order entering judgment in the District Court is included in Appendix C at 19a-20a.

BASIS OF JURISDICTION

1. Jurisdiction of This Court

The Second Circuit decided this matter on September 17, 1999; leave for rehearing was timely requested on October 1, 1999. Leave for rehearing was denied on November 17, 1999. As this petition is filed within ninety days of the denial of a timely petition for rehearing, it is timely. Supreme Court Rule 13.3.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

2. *Jurisdiction of the Court of Appeals*

The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291, in that this was an appeal from a final decision of the United States District Court for the Southern District of New York (Rakoff, J.), entered August 25, 1998, dismissing certain of Plaintiffs' claims (specifically, their claims under the Securities Exchange Act of 1934 and the Racketeer Influenced Corrupt Organizations Act) with prejudice, and the remainder of their claims without prejudice, upon a motion to dismiss or abstain. A Notice of Appeal was filed on September 18, 1998.

3. *Jurisdiction of the District Court*

The subject matter jurisdiction of the District Court over the claims in this action was invoked pursuant to 28 U.S.C. § 1331, in that this action arises under the laws of the United States, specifically the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.*, and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* Subject matter jurisdiction over the claims that arise under state law was invoked pursuant to the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367(a).

STATUTORY PROVISIONS

Racketeer Influenced and
Corrupt Organizations Act,
18 U.S.C. § 1962(a)

"It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or

indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

* * * *

Securities Exchange Act of 1934
Rule 10b-5, 17 C.F.R. § 240.10b-5

"It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

STATEMENT OF THE CASE

1. *Introduction*

This action arises out of the massive fraud committed by Coutts Bank (Switzerland) Ltd. ("Coutts") in inducing Mordechai and Margaret Gal-Oliver to purchase stock based upon representations that Coutts either knew or reasonably should have known were false at the time that they were made. In particular Coutts, through its officers, induced the Gal-Olivers to accept a loan of $1 million[1] and to use $700,000 of that loan to purchase stock in a fledgling company known as Global Shopping Network, Inc. It did so by representing to the Gal-Olivers that the value of the stock would increase exponentially as a result of a proposed initial public offering ("IPO"). The Gal-Olivers had every reason to believe Coutts' representation, as it was seemingly based upon information in Coutts' possession. In particular, several of Coutts' officers informed the Gal-Olivers that the value of the stock would rise precipitously, and that Coutts had made an absolute and unconditional commitment to make a loan of $100 million for the company's use. From his own research, Mordechai knew that such a loan would virtually ensure the success of the IPO. Unfortunately, not only did Coutts never make the loan, it now denies that it ever even made the commitment. In fact, as the Gal-Olivers later learned, New York law prohibited it from making the promised loans. GSN was forced into bankruptcy, rendering the stock virtually

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[1] In a bizarre scheme apparently designed to make it appear that the Gal-Olivers, who had few assets, had pledged significant collateral in support of the loan to them, Coutts required the Gal-Olivers to accept a loan of $2 million, and "invest" $1 million of that sum in a certificate of deposit at Coutts. Although the Gal-Olivers paid interest on the full $2 million, they were never permitted access to the funds held by Coutts.

worthless. The Gal-Olivers then brought this action for violation of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, as well as for breach of contract and common law fraud

2. *Factual Background*

A friend of the Gal-Olivers, Rachamim Anatian, ("Anatian") was one of the founders of USA Detergents, Inc. ("USAD"), a manufacturer of "value-branded" household detergents. (A35)[2] In 1995, before the initial offering of USAD shares to the public, Anatian became a customer of Coutts. (A231) Coutts pursued a highly aggressive strategy in making substantial loans to Anatian.

In the same year, Anatian and a colleague, Barbara Laurence, founded Global Shopping Network, Inc. ("GSN"),[3] an electronic retailer that was to sell merchandise to customers via television. (A35, 394-95) GSN began televising its home shopping programming in March 1996 through cable and satellite distribution. The programming ultimately was carried in approximately 7 million to 8 million homes. (A 394-95)

While several television home shopping networks have been extremely successful, it had become widely

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[2] Reference is made to the Joint Appendix filed by the parties with the Second Circuit, and designated as A___. One copy of the Joint Appendix is being filed with this Petition for the convenience of the Court.

[3] For simplicity, GSN and both of its related entities, Global Broadcasting Systems and Ramcast, Inc., are referred to herein as "GSN."

acknowledged in the industry that a carriage of at least 20 million cable homes is essential for success. (A30) Anatian planned to achieve this carriage by purchasing television stations in key markets. He intended to fund these purchases through an IPO of at least $400 to $500 million. (A37, A398-99) Because GSN was a fledgling company which could not demonstrate a favorable earnings record to securities underwriters, initial private or sponsor's financing of at least $100 million, in lieu of such an earnings record, was determined to be necessary in order to enable the anticipated IPO to proceed. (A37)

Upon learning of Anatian's plans for GSN, Coutts expressed eagerness to provide the requisite initial financing. Time and time again, its officers assured not only Anatian, but other business people and GSN executives who were depending upon GSN's receipt of adequate financing, that Coutts had made an absolute and unconditional commitment to make a loan of $100 million for Anatian's use in connection with GSN. (A38; A489-507) Coutts eventually suggested that Anatian form seven limited liability companies (the LLCs) to receive the loan proceeds. (A41) Anatian agreed to the financing plan. (*Id.*) At Coutts' officers' request, he arranged for the creation of the LLCs and, in June of 1996, received the first installment of the loan proceeds. (A47-48)

As part of his plan for GSN, Anatian hoped to recruit the best talent available. To that end, he contacted an old friend, Mordechai Gal-Oliver ("Mordechai"), and asked Mordechai to became the head of production for GBS. (A41-42) Anatian offered Mordechai a compensation package along with the right to purchase stock at a pre-IPO price of $700,000. (A43-44) At that time, Mordechai was living in Israel with his wife Margaret and their nine children. (A35)

He was employed as a spiritual leader and occasional television commentator. (*Id.*) Although he had few assets, he was not interested in uprooting his life at that time. Nevertheless, he agreed to come to the United States at least temporarily to assist his friend in setting up GSN. (A42)

Coutts joined Anatian in his efforts to convince Mordechai to join GSN. To that end, four of its officers – specifically identified in the Complaint as Paul Imison, Peter Cawdron, Derek Simmons and Mario Economou (the four of whom, together, were referred to in the Complaint as the "Coutts Representatives") – confirmed to Mordechai that it (Coutts) had absolutely and unconditionally agreed to loan Anatian, through the LLCs, at least $100 million.[4] (A37; A44-45) Through his own research, Mordechai was able to confirm that an infusion of funds of this magnitude would virtually ensure a successful IPO. (A42-43)

At the same time, Mario Economou, one of the Coutts officers, represented that the stock Mordechai had been given the right to purchase would be worth between $10 million and $15 million after the IPO. (A46) In reliance upon these representations, Mordechai decided to work for GSN and to purchase the stock. (A46-47; A55-56) In order to do so, he needed substantial funds. Coutts offered to lend him and Margaret $1 million to purchase the stock, to move their family to the United States, to purchase a home, and to enable Mordechai to support his family until he was able to receive

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[4] In the courts below, Coutts argued that the Gal-Olivers were not entitled to rely upon this oral representation because of allegedly contrary written representations in promissory notes executed by Anatian. There is no reason to believe that the Gal-Olivers ever saw or had access to these documents. Accordingly, they had no reason whatsoever not to believe and rely upon the representations of Coutts' officers.

a salary.[5] (*Id.*) Once again in reliance upon Coutts' representations, the Gal-Olivers accepted this loan and purchased the GSN stock. (*Id.*)

Coutts handled the loan proceeds in a peculiar and restrictive manner. In particular, although the Gal-Olivers only needed a loan of $1 million, Coutts demanded that they sign a promissory note in the amount of $2 million. The remainder of the funds ($1 million) would be kept in a certificate of deposit at Coutts. (A342)

The bizarre requirements were reminiscent of equally bizarre restrictions placed upon the loans extended by Coutts to Anatian. Although Coutts technically made loans in the aggregate of $57 million, Coutts required that $15 million – more than 25% of the loan proceeds – be retained in certificates of deposit at Coutts, to which Anatian was permitted no access. (A409; A412-13) Another $33 million was applied to retire loans that Coutts previously made to Anatian for his benefit. (*Id.*) Thus, with the first installment of the loan proceeds, only $9 million in additional funding was actually released to the LLCs. (*Id.*)

In the following months, Coutts continued to assure, among others, Mordechai and Anatian that the $100 million commitment was absolute and unconditional, while at the same time placing increasingly bizarre restrictions on loan funds. (A452-58) In fact, while Coutts eventually "loaned" the LLCs approximately $72 million, it required that more than 40% of those funds – that is, more than *$30 million* – be retained in certificates of deposits at Coutts or used to purchase additional shares in USAD, which Coutts then held as collateral. Only

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[5] Because Mordechai is an Israeli citizen, he was not immediately able to work for salary in the United States.

$2.5 million more in usable funds was ever released to the LLCs. (*Id.*)

Coutts subsequently assured Anatian, however, that the funds it was holding in the form of CDs and additional collateral, as well as additional loan funds, would be released when Anatian was able to meet certain conditions, such as retaining an underwriter and arranging bridge financing for the IPO. (A452-48) Whenever Anatian the stated requirement, however, Coutts came up with yet another requirement for the release of funds. (*Id.*)

Nevertheless, in reliance upon Coutts' $100 million Commitment, Anatian began acquiring assets and planning the IPO. (A454) GSN acquired, or obtained the right to acquire, ten television stations. (*Id.*) It filed a Form S-1 Registration Statement with the Securities and Exchange Commission. (A105-106) It retained an underwriter for the IPO, and obtained bridge financing. (A452)

By June 1997, Coutts' continued refusal to release further funds resulted in the scuttling of the IPO and the financial devastation of both GSN and Anatian himself. (A49) As the Gal-Olivers and Anatian later learned, the Commitment was never anything more than an elaborate fraud. Coutts could never legally have made the loans, because they exceeded both Coutts' internal loan limits and its statutory loan limits. N.Y. Banking Law § 202-f (applying Banking Law 103 to foreign banks). (A50) Moreover, even if Coutts' New York office had the legal authority to make the loans, the Coutts officers making the commitment did not have the authority to make a commitment of this magnitude without the permission of their London superiors -- permission which the Coutts New York officers did not even request until well after they had made the Commitment, and after Anatian had pledged millions of dollars

in collateral. (*Id.*) Indeed, the required permission from London was never received. (*Id.*)

In the aftermath of GSN's collapse, the Gal-Olivers were unable to keep up their payments to Coutts. Coutts thereupon brought an action in the New York State courts on the promissory note signed by the Gal-Olivers. (A205-27) The trial court rejected on technical grounds[6] the Gal-Olivers' claim of fraudulent inducement. The Gal-Olivers brought this action in the District Court shortly after the state court action was commenced, but before any response was filed in such action.

Within months of its repudiation of the Commitment, Coutts fired all of the officers involved in this transaction and announced the closing of its New York office (A49) – only to have its parent company, National Westminster Bank, apply to reopen the location as a NatWest branch. Published reports indicate that both the Federal Reserve Bank and the New York District Attorney's Office are currently investigating allegations of fraud and impropriety against Coutts.[7]

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[6] The trial court found that evidence of fraud in the inducement was barred by contractual merger clause; it is the Gal-Olivers' contention that such merger clause is "general" not "specific" and accordingly, does not bar evidence of fraud in the inducement. *See, e.g. Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993). The intermediate appellate court upheld the trial court's decision in an opinion that never even refers to the Gal-Olivers or to the specific defenses that they raised. The Gal-Olivers intend to request leave to appeal to the New York Court of Appeals when the judgment becomes final.

[7] Anatian has been indicted for fraud in connection with the filing of certain papers in the GSN bankruptcy. He has vehemently denied these charges. The indictment concerns Anatian's proof of claim in the GSN bankruptcy and has nothing to do with the Gal-

ARGUMENT

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND GRANT CERTIORARI IN LIGHT OF THE SECOND CIRCUIT'S WHOLESALE DISREGARD OF VARIOUS MATERIAL ALLEGATIONS OF THE PLEADINGS AND OF THE EXISTENCE OF A REQUEST FOR LEAVE TO AMEND THIS ACTION

1. Introduction

In this matter, the Second Circuit issued what, on its face, appears to be a proper statement of the law. It is only when one looks beyond the surface of that opinion that it becomes apparent that the Second Circuit departed from the accepted course of judicial conduct in a manner that can only be described as shocking and wholly improper, and which undermines the very foundation of our system of jurisprudence.

As is shown below, the Second Circuit held that the Gal-Olivers failed to state a claim by ignoring their valid claims and substituting other claims that the Gal-Olivers never made. The Second Circuit then held that the claims that *it created* did not state a claim upon which relief may be granted, and dismissed those claims *without so much as referring to the claims actually raised by the Gal-Olivers*. This can only be viewed as a deliberate decision by the Second Circuit to ensure that the plaintiffs do not prevail notwithstanding the legitimacy of their claims.

Rulings such as these cannot be tolerated. While the Gal-Olivers recognize that this does not constitute a classic case

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Olivers or with their claim against Coutts.

for certiorari, it presents what may be one of the most blatant miscarriages of justice that will be brought to the attention of this Court this year. The results are no less far-reaching than those relating, for example, to a conflict between Circuits. For if a court is free to ignore the parties' actual claims, our system of jurisprudence has failed.

2. *The Second Circuit Dismissed Plaintiffs' RICO Claims on the Grounds That They Did Not Comply with the Requirements of 18 U.S.C. § 1962(c), When Plaintiffs Did Not Even Make a Claim Under That Section*

The most egregious example of the Second Circuit's mishandling of the appeal below is its cavalier dismissal of Plaintiffs' RICO claim on the grounds that "plaintiffs failed to allege an 'enterprise' sufficiently distinct from the RICO 'person' with respect to the claims based on [18 U.S.C.] section 1962(c)." Appendix A at 7a. Plaintiffs, however, *never even pursued a claim under 18 U.S.C. § 1962(c).*[8] To the contrary, Plaintiffs asserted a claim under 18 U.S.C. § 1962(a). (A125-29) It is well established that the "enterprise" and "person" may be identical for the purpose of a claim under section 1962(a). *See, e.g., Official Publications v. Kable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 (7th Cir.), *cert. denied* 486 U.S.

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[8] Plaintiffs had asserted an additional claim under 18 U.S.C. § 1962(c) in the District Court. In that claim, Plaintiffs alleged the existence of a RICO enterprise made up of the four Coutts officers – Imison, Cawdron, Simmons and Economou. Plaintiffs further alleged that Coutts was responsible for the actions of the enterprise by virtue of *respondeat superior*. (A60-65) *See* Plaintiffs-Appellants Brief in the Second Circuit, p. 35, n. 10 ("Plaintiffs have chosen not to pursue this claim upon appeal."). Such claim was thus not before the Second Circuit.

1061 (1988); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd* 473 U.S. 606 (1985).

3. *The Second Circuit Found That the District Court Had Not Abused Its Discretion in Denying Leave to Amend Because Such Leave Had Not Been Requested, Even Though the Record Clearly Shows That Leave to Amend* Was *Requested*

The Second Circuit's misplaced reliance on 18 U.S.C. § 1962(c), regrettably, was not the sole instance in which it based its decision upon matters having no relation whatsoever to the case at hand. In fact, *each and every ground upon which the Second Circuit based its decision has no basis whatsoever in the pleadings.*

While "recogniz[ing]" that "leave to amend should be freely granted, especially in the case of a Rule 9(b) dismissal," the Second Circuit found that "plaintiffs made no attempt to seek leave to amend their amended complaint," and that, accordingly, it was not "an abuse of the district court's discretion to order [the] case closed. . . ." Appendix A at 8a. In fact, however, leave to amend *was* requested and specifically denied by the District Court. (A734, A754) Thus, by the Second Circuit's own reasoning, the District Court *did* abuse its discretion in refusing to grant Plaintiffs leave to amend their complaint. *See also, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("Rule 15(a) [of the Federal Rules of Civil Procedure] declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given'"); *Oliver Schools, Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991) ("Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course"); *Ronzani v. Sanofi*, S.A., 899 F.2d 195, 198 (2d Cir. 1990) ("Since [plaintiff] had not previously been given leave to amend, and had offered to amend his complaint, we hold that the court abused its discretion in dismissing the complaint without leave to amend").[9]

4. *In Holding That Plaintiffs' Securities Claim Was Not "In Connection With the Purchase or Sale of a Security," The Second Circuit Ignored Plaintiffs' Allegation That They Purchased Securities as a Result of a Fraudulent Misrepresentation as to Their Value*

The Second Circuit ignored Plaintiffs' factual allegations that established their right to relief even absent amendment. Consequently, the Appellate Court affirmed the dismissal of Plaintiffs' claims under the Securities Exchange Act of 1934, 15

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[9] In opposition to a petition for certiorari filed by Anatian in a related case, Coutts has argued that amendment would be futile not because there is no set of facts that could state a valid claim, but because plaintiffs failed to do so in an "inordinately long" complaint. There has been no demonstration, however, that amendment would be futile. In this action, plaintiffs have offered to correct each alleged defect in their Complaint. Particularly in the case of a dismissal for failure to plead fraud with particularity, plaintiffs should be given the opportunity to so amend. *See, e.g., Luce v. Edelstein*, 802 F.2d 49, 56-57 (2d Cir. 1986); *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 561-62 (2d Cir. 1985).

U.S.C. § 78, on the grounds that "the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security.... Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark." Appendix A at 6a. This is *not,* however, the basis of Plaintiffs' securities claim. Plaintiffs' actual contention – which the Second Circuit utterly ignored – was that Plaintiffs were induced to purchase securities based upon fraudulent misrepresentations as to the value of that stock. In particular, the Gal-Olivers alleged:

- "Economou represented to Mordechai [Gal-Oliver] that such 2.5% of GSN and Ramcast stock, which Mordechai would be able to purchase for $700,000, would be worth $10 million to $15 million as a result of the prospective [initial public offering]." (A46)

- "Relying upon such representation as to the ultimate worth of his 2.5% of GSN and Ramcast common stock, and upon the Coutts Commitment [to make a loan of $100,000,000 to facilitate such initial public offering], Mordechai advised Anatian that he would accept the position as COO of GSN." (A46)

- "Plaintiffs, as anticipated, then used the monies made available . . . to purchase said stock.. . ." (A47)

Moreover, the Gal-Olivers alleged that at the time these representations were made, Coutts, and Coutts alone, either knew or reasonably should have known that they were false. In particular, the Gal-Olivers alleged: (1) Coutts' officers (again, specifically identified by the Complaint as Paul Imison, Peter Cawdron, Derek Simmons, defined and later abbreviated as the "Coutts Representatives") were aware that the stock had no value unless a proposed initial public offering took place (A36-37); (2) Coutts' officers also knew that the IPO could not take place unless the company received at least the $100 million in private funding which Coutts had promised to the company's founder, Rachamim Anatian (A37); and (3) Coutts' officers knew (or should have known) that Coutts could not provide the funds, not only because it was forbidden to do so by its own internal policies, but because it would have been illegal for Coutts to do so. (A 36-38, A 50-51)

The misrepresentations relied upon by the Gal-Olivers – that the stock would increase exponentially in value when Coutts knew or should have known that it would not and, indeed, could not – are precisely the sort of misrepresentation to which the statute is addressed. *See Goldman v. Belden*, 754 F.2d 1059, 1069 (2d Cir. 1985) (allegations of "positive predictions," made with "knowledge of ... undisclosed negative factors" concerning the value of stock purchased by plaintiffs are sufficient to state a claim for securities fraud under section 10(b)); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 164 (2d Cir. 1980) (liability for securities fraud may be predicated upon the intentional fostering of a mistaken belief concerning the evaluation of a company's progress and earning prospects); *see also Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) ("a relatively concrete representation as to a company's future performance, if made at a time when the speaker knows that the represented level of performance cannot be achieved, may ground a claim for fraud").

In fact, this type of allegation is the very essence of a claim under section 10b of the Securities Exchange Act of 1934. *See Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir. 1984), *cert. denied*, 469 U.S. 884 (1984) ("[T]he purpose of § 10(b) and Rule 10b5 is to protect persons who are deceived in securities transactions -- to make sure that *buyers of securities get what they think they are getting* and that sellers of securities are not tricked into parting with something for a price known by the buyer to be inadequate or for a consideration known by the buyer not to be what it purports to be" (emphasis added)); *Weaver v. Marine Bank*, 637 F.2d 157 (3d Cir. 1981), *rev'd (on other grounds)* 455 U.S. 551 (1982) (bank induced plaintiffs to pledge securities in support of a loan, knowing all the while that the loan was problematic; the plaintiff-"sellers" thus did not receive full value in return for the pledge of their securities and, accordingly, the transaction was "in connection with" the sale of securities). It was only by totally ignoring the well-pleaded allegations of the complaint that the Second Circuit was able to find to the contrary.

5. The Second Circuit Ignored Plaintiffs' Allegations in Dismissing Their Claims for Failure to Plead Fraud With Particularity

The Second Circuit dismissed Plaintiffs' fraud-based claims for failure to plead with specificity, on the grounds that "[a]lleging that Coutts made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud." Appendix A at 7a. While this point is undeniably true, it bears no relation whatsoever to Plaintiffs' fraud allegations. What the Gal-Olivers *actually* pleaded is that Coutts promised to make a $100 million loan, and intended that the Gal-Olivers rely on that promise, in the knowledge (or constructive knowledge) *that it could not legally make the entire loan.*

The "fraud" element of a claim under Rule 10b-5 requires a litigant to allege (1) a misstatement of material fact (2) made with scienter (3) upon which the plaintiff justifiably relied (4) causing damages. *In re Time Warner, Inc. Sec. Litig.*, 9 F.3d 259, 264 (2d Cir. 1993), *cert. denied sub nom Ross v. Zvi Trading Corp.*, 511 U.S. 1017 (1994) and *sub nom Zvi Trading Corp. Employees' Money Pension Plan v. Ross*, 511 U.S. 1017 (1994). With respect to element (1) (misstatement of material fact), the Private Securities Law Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(1), requires that the complaint "shall specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading. . . ." This element is similar to that of Rule 9 of the Federal Rules of Civil Procedure, which requires any party alleging fraud of any kind to specify (1) the statements alleged to be fraudulent; (2) the speaker; (3) where and when the statements were made; and (4) why the statements were fraudulent. *See, e.g., Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). Plaintiffs' complaint adequately identifies each of these elements.

As stated in Plaintiffs' Complaint, the statements alleged to be fraudulent are statements relating to the value of stock that the Coutts officers encouraged the Gal-Olivers to purchase, most notably a statement by Mario Economou, a Coutts officer, to Mordechai Gal-Oliver that the stock would increase in value from the $700,000 purchase price to in excess of $10 million. (A46-47, A50-51) As further stated in the Complaint, these statements were made in the spring of 1996, at a time when the Gal-Olivers were considering the purchase of these stocks. (A 46-47) The underlying the basis for the prediction that the value of the stock would increase so dramatically was the Coutts commitment to lend the company at least $100 million, facilitating an initial public offering in the amount of $400 million to $500 million. In fact, however, although Coutts did

indeed promise to make such a loan, it could not, legitimately, have fulfilled its promise, not only because the loan exceeded its internal per-borrower loan limits, but also because the loan exceeded legal per-borrower loan limits. (A 50-51) The representation that the stock would be worth in excess of $10 million was, accordingly, fraudulent as the Coutts officers either knew or should have known that such representations were false.

The speakers of the misrepresentations, particularly Mario Economou, are identified with sufficient particularity. So are the time and place of the representations – i.e., at some time in the immediate period before plaintiffs accepted a loan from Coutts and purchased the stock with the proceeds of that loan. (A 46-47)

The reasonableness of plaintiffs' reliance is also fully and adequately detailed. Briefly, plaintiffs investigated the company and the prospects for a successful IPO and were convinced that, if Coutts provided the promised funding, the stock's value would increase exponentially, a conclusion that Economou expressly confirmed. (A42-43) Moreover, Coutts was a substantial bank, wholly owned by Great Britain's third largest bank (NatWest); it had been existence more than 300 years and, in fact, was known colloquially as the "Queen's Bank." (A394)

The reason that the representations were fraudulent is detailed. Coutts was always aware that the stock would have no value unless it provided at least $100 million in private funding; it also knew (or should have known) that both New York law and its own internal regulations prohibited it from providing that funding.

Finally, scienter is adequately pled. The PSLRA requires that a litigant "state with particularity facts giving rise to a strong inference that the defendant[s] acted with the required state of mind," that is, in a 10b-5 case, with scienter. The cases applying PSLRA pleading requirements to 10b-5 claims have found that scienter, or intention, includes not only purposeful knowing action, but reckless behavior, defined as a highly unreasonable departure from the standards of ordinary care, "to the extent that the danger was either known to defendants or was so obvious that defendants must have been aware of it." *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 241 (S.D.N.Y. 1997); *Norwood Venture Corp. v. Converse, Inc.*, 959 F. Supp. 205, 208 (S.D.N.Y. 1997).

Coutts' officers were of course aware that the GSN stock had little or no value absent the IPO, and that the IPO could not take place if Coutts did not honor its Commitment to make a loan of at least $100 million for Anatian's use. (A37, 47) They were aware that they were without the necessary authority to make this loan. (A50-51) They had no reason to believe that the Commitment could be fulfilled. Yet they made that Commitment -- and repeated it over and over and over again. Moreover, they represented to the Gal-Olivers that, upon completion of the IPO, the GSN stock which Plaintiffs had the right to purchase for $700,000 would be worth between $10 million and $15 million (all the while knowing that, absent an IPO – which could not occur unless the Coutts loan was consummated – the stock would be worthless). (A46) This was by any measurement a departure from the standards of ordinary care, of which any reasonable person should have been aware. In setting forth these facts, the Complaint satisfies the scienter requirement.[10]

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[10] Coutts has repeatedly urged the courts to reject upon a motion to dismiss Plaintiffs' claims on the grounds that it (Coutts) had no

Thus, fraud was adequately alleged in the Complaint. As should be evident to this Court, the gravamen of Plaintiffs' allegations have nothing to do with the ability of any party to repay any loan.

6. Justice Requires That Certiorari be Granted

In sum, the Second Circuit has first substituted its own, inaccurate version of Plaintiffs' claims for the claims that Plaintiffs actually asserted, and then dismissed these claims as deficient. In so doing, it has crafted a decision that, while facially unassailable, results in an egregious miscarriage of justice which forecloses the individual Plaintiffs, who lost virtually their entire net worth as a result of Coutts' fraud, from any basis of redress in federal court.

Such a result is antithetical to any notion of justice. It is the keystone of our system of jurisprudence that each and every claim should be addressed as asserted. When an appellate court simply ignores the facts and law as actually pleaded and renders its decision as though the plaintiff has asserted wholly different claims, our most treasured principles of fair play are violated. It is respectfully submitted that this Court should not and must not permit such a cavalier mishandling of *any* plaintiff's claims. In order both to rectify an aberrant scar on our jurisprudence, and to allow the litigants their constitutional right to be heard on the actual claims they have has asserted, *certiorari* should be granted.

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economic motive for the actions alleged. The PSLRA does not require a plaintiff to demonstrate the defendant's economic motive. In fact, "courts have held that general allegations of financial interest are insufficient to prove scienter." *Rubinstein v. Skyteller, Inc.*, 48 F.Supp.2d 315, 321 (S.D.N.Y. 1999).

CONCLUSION

For the reasons set forth above, *certiorari* should be granted in this matter.

Respectfully submitted,

/s/_____

Mordechai Gal-Oliver
Margaret Gal-Oliver
Peretz Bernstein 42
Ramat Chen, Ramat Gan
Israel

Petitioners pro se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Decided September 17, 1999]

Nos. 98-9269, 98-9270

RACHAMIN ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC, KABALLA LLC, KETER LLC, MAMASH LLC and VAN HARPER LLC,
Plaintiffs-Appellants,

v.

COUTTS BANK (SWITZERLAND) LTD., formerly known as COUTTS & CO. AG,
Defendant-Appellee.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs-Appellants,

v.)
)
COUTTS BANK (SWITZERLAND)
LTD., formerly known as)
COUTTS & CO. AG,)
Defendant-Appellee.)
)

(Argued: April 28, 1999)

Before: WALKER and POOLER, *Circuit Judges* and MOTLEY, *District Judge.*[*]

Appeal from memorandum order and judgment of the United States District Court for the Southern District of New York (Rakoff, J.) dismissing plaintiffs' federal securities fraud and antiracketeering claims with prejudice. Appellants claim that the district court erred in (1) dismissing their securities fraud claims for failure to state a claim under the Securities and Exchange Act of 1934 and failure to plead fraud with particularity; (2) dismissing their RICO claims for failure to allege a RICO "enterprise" sufficiently distinct from the RICO "person" and failure to plead fraud with particularity; and (3) dismissing the amended complaint without granting leave to amend.

Affirmed.

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[*] The Honorable Constance Baker Motley, Senior United States District Judge of the Southern District of New York, sitting by designation.

POOLER, *Circuit Judge*:

Rachamin Anatian, seven limited liability companies he controls, Mordechai Gal-Oliver and Margaret Gal-Oliver ("plaintiffs") appeal from the memorandum order and judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) dismissing their securities fraud and RICO allegations. We conclude that plaintiffs failed to state a claim for fraud in connection with the sale or transfer of a security and failed to allege a RICO "enterprise" in connection with the section 1962(c) claims sufficiently distinct from the RICO "person." In addition, we find that plaintiffs failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). Therefore, we affirm the judgment of the district court.

BACKGROUND

In reviewing the dismissal of a complaint, we must accept as true the facts alleged in the complaint and draw all reasonable inferences in plaintiffs' favor. *See Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 43 (2d Cir. 1997). The facts, unless otherwise noted, are as plaintiffs allege. In 1995, Rachamin Anatian became a client of Coutts Bank. He borrowed over $3.7 million from Coutts, secured by his shares of stock in USA Detergents. In the spring and summer of 1995, Anatian founded and became principal shareholder of a home shopping network known as Global Shopping Network, Inc. ("GSN"), and its successor Global Broadcasting Systems, Inc. ("GBS"). Anatian recruited Mordechai Gal-Oliver, an Israeli television personality, to be Chief Operating Officer of GSN.

Plaintiffs claim that between 1995 and 1997 Coutts representatives fraudulently induced Anatian to borrow $100 million from Coutts to purchase TV stations and supply the private equity element for the initial public offering of GSN. Coutts representatives also persuaded Anatian to create seven limited liability companies to which the bank could loan money for Anatian's benefit, while circumventing the internal and legal per-borrower lending limits. Coutts representatives assured Anatian that this arrangement would satisfy internal lending regulations and that the New York office had the authority to make such loans without approval of any other Coutts office. The Gal-Olivers also claim that Coutts representatives convinced them to borrow $2 million, half of which was retained in a Courts certificate of deposit, and half of which was used by the Gal-Olivers to buy GSN stock and a home in Brooklyn.

Anatian pledged his stock in USA Detergents as collateral for his personal loan and arranged for the limited liability companies to pledge GSN stock as collateral. Plaintiffs claim that Coutts falsely inflated the value of the GSN stock pledged as collateral for the loans in order to extend more credit to them. After extending millions of dollars in loans to Anatian, the related limited liability companies, and associates, the Coutts representatives allegedly reneged on their loan commitment, claiming that the Coutts home office put a halt to the arrangement. Without further credit, there could be no public offering, and GSN declared bankruptcy.

In August and October of 1997, Coutts sued Anatian, the limited liability companies, and the Gal-Olivers in two related state court actions for defaulting on more than $40

million in loan obligations. *See Anatian et al. v. Coutts Bank,* Nos. 97 CIV. 9280 (JSR), 97 CIV. 9492 (JSR), 1998 WL 526440, at *1 (S.D.N.Y Aug. 21, 1998). Shortly thereafter, plaintiffs commenced these actions in federal court alleging, among other things, violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b), and the civil provisions of the RICO statute, 18 U.S.C. §1961 et seq. Defendants moved pursuant to Fed. R. Civ. P. 12 to dismiss or stay the federal actions. On August 21, 1998, the district court dismissed plaintiffs' federal claims and declined to exercise jurisdiction over the remaining state claims, in light of the pending action in New York Supreme Court. *See Anatian,* 1998 WL 526440, at *4.

DISCUSSION

We review *de novo* the district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a claim, accepting as true the factual allegations of the complaint. *See Chill v. General Elec.,* 101 F.3d 263, 267 (2d Cir. 1996). The dismissal will be upheld only if "plaintiff can prove no set of facts upon which relief may be granted." *See Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1127 (2d Cir. 1994). Furthermore, when a plaintiff alleges securities fraud, we must also consider the complaint in light of Fed. R. Civ. P. 9(b), which requires plaintiffs to plead fraud with particularity. *See id.* The complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* at 1128 (internal citations omitted).

Appellants argue that the district court erred in

dismissing their securities fraud claim because Coutts' misrepresentations regarding the loan commitment were made in connection with the purchase or sale of securities. We agree with the district court that plaintiffs failed to state a claim for securities fraud and failed to plead fraud with particularity.

> The purpose of § 10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions - - to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be.

Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984). Even if plaintiffs' allegations were true, the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment do not pertain to the purchase or sale of a security. The district court properly rejected plaintiffs' attempt "to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims." *Anatian*, 1998 WL 526440, at *2. Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark. It is not sufficient to allege fraud in a transaction in which a security is a part. *See Chemical Bank*, 726 F.2d at 943. Therefore, we affirm the dismissal of the securities fraud claim.

In addition, we find that Judge Rakoff properly dismissed both the securities fraud and RICO claims for failure to plead fraud with particularity. Alleging that Coutts Bank made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud. Nor were the RICO predicate acts of mail and wire fraud alleged with sufficient particularity. Even if we were to find that the time and content of those communications met the Rule 9(b) standard, plaintiffs' claim must be dismissed because they failed to allege how those statements were fraudulent.

Appellants also argue that the district court erred in dismissing their RICO claims. They claim the New York office of Coutts Bank engaged in a business practice of attempting to circumvent internal and legal lending limits and extending credit without authority to do so. To state a RICO claim, a plaintiff must plead "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L.v. Imrex Co.*, 473 U.S. 479, 496 (1985). In addition, a plaintiff must plead injury to business or property as a result of the RICO violation. *See id; accord* 18 U.S.C. §1964(c).

We affirm the dismissal of the RICO claims for the reasons set forth by the district court. In addition to the Rule 9(b) infirmities, we agree with the district court that plaintiffs failed to allege an "enterprise" sufficiently distinct from the RICO "person" with respect to the claims based on section 1962(c). "[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985). Plaintiffs alleged that Coutts was an "enterprise" within the

meaning of sections 1961 and 1962 as well as a "person" as defined in section 1961(3). Plaintiffs cannot circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).

Finally we note that the district court was not obliged to grant plaintiffs leave to amend their complaint. While we recognize that leave to amend should be freely granted, especially in the case of a Rule 9(b) dismissal, *see Chill,* 101 F.3d at 271, we will not "deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought." *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 664-65 n. 3 (2d Cir. 1997) (quoting *Shields v. Citytrust Bancorp., Inc.* 25 F.3d at 1132). Here, plaintiffs made no attempt to seek leave to amend their amended complaint either before or after the district court's decision. Nor was there any showing as to how plaintiffs might amend their complaint to cure their pleading deficiencies, especially in light of the insufficiency of facts to support a claim. Therefore, we reject plaintiffs' claim that the district court erred in not granting leave to amend. We have considered appellants' remaining contentions and find them to be without merit.

CONCLUSION

For the foregoing reasons we affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Dated August 20, 1998]

Nos. 97 Civ. 9280 (JSR)
97 Civ. 9492 (JSR)

RACHAMIM ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC, KABALLA LLC, KETER LLC, MAMASH LLC, and VAN HARPER LLC,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs,

v.

COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

The plaintiffs in these two related cases -- Rachamim Anatian, seven limited liability companies he controls, his associate Mordechai Gal-Oliver, and Mr. Gal-Oliver's wife Margaret -- previously defaulted on more than $40 million in obligations they owed to Coutts Bank. Coutts thereupon sued them for default in two related New York State actions commenced respectively in August and October 1997. Plaintiffs counterattacked by commencing the instant federal actions against Courts in December 1997, alleging breach of contract, breach of the contractual obligation of good faith and fair dealing, common law fraud, negligent misrepresentation, promissory estoppel, violation of the antifraud provisions of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and violations of the RICO statute, 18 U.S.C. § 1961 et seq. The Anatian plaintiffs also sought a declaration that the loan contracts on which Coutts is suing them in State court are void for violation of federal bank Regulation U, 12 C.F.R. § 221, and unspecified New York State banking regulations.

Defendant promptly moved under Rule 12, Fed. R. Civ. P., to dismiss or stay these federal actions. Following review of the parties' written submissions and oral arguments, the Court telephonically advised the parties on March 6, 1998 that defendant's motions would be granted. This Memorandum Order will serve formally to confirm those rulings and briefly state the reasons therefor.

The gist of the plaintiffs' inordinately lengthy

Complaints[1] is to allege that they were fraudulently induced by Coutts to borrow too much money and to believe that they could borrow still more. The larger of the loans, of approximately $57 million, resulted from negotiations between plaintiff Rachamim Anatian, the founding and principal shareholder of a company called Global Shopping Networks, Inc. ("GSN") and its successor Global Broadcasting Systems, Inc. ("GBS"), and a group of Courts employees referred to as the "Coutts Representatives." See Anatian Complaint at ¶¶ 2, 17, 25, 53, 68. According to the Anatian Complaint, between 1995 and 1997 the Coutts Representatives fraudulently induced Anatian to help them circumvent Coutts' internal loan limitations by, inter alia, creating puppet entities (the seven limited liability plaintiffs), to which Coutts could then make excessive loans for Anatian's benefit. See, e.g., id. at ¶¶ 36-52. The alleged purpose of this scheme was to enable Anatian and his associates to borrow the estimated $100 million or more they needed to purchase certain television stations and take their proposed televised-shopping network public, while in the process expanding Courts' loan business in North America. See id. at ¶¶ 24, 28-33. However, after making more than $57

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[1] The First Amended Complaint of the Anatian plaintiffs ("Anatian" Complaint) consists of 194 paragraphs spread over 53 pages, plus 46 pages of annexed exhibits. The First Amended Complaint of the Gal-Oliver plaintiffs ("Gal-Oliver" Complaint) consists of 145 paragraphs spread over 33 pages, plus 8 pages of annexed exhibits.

million in loans to Anatian and related entities and associates,[2] the Coutts Representatives refused to fulfill their alleged commitment to extend still further credit, contending in effect that the commitment had been countermanded by Coutts' home office. See id. at ¶¶ 70-79. The alleged result was not only to derail the proposed public offering, see id. at ¶¶ 90-92, but ultimately to force GBS into bankruptcy, see id. at ¶ 93.

One of Anatian's associates in these ventures was Mordechai Gal-Oliver, a sometime rabbi and occasional Israeli television commentator, who became Chief Operating Officer of GSN. See Gal-Oliver Complaint at ¶¶ 3, 9-10, 56. According to the allegations of the Gal-Oliver Complaint, which largely echo those of the Anatian Complaint, Gal-Oliver and his wife were enticed by the Courts Representatives' fraudulent representations to borrow $2 million from Coutts, see id. ¶¶ 41-58, half of which was retained in a Coutts certificate of deposit, see id. ¶ 52, and the remainder of which was used by the Gal-Olivers to purchase stock in Anatian's fledgling network and a home for themselves in Brooklyn, see id. ¶ 58. Further, according to the Gal-Oliver Complaint, the Coutts Representatives,

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[2] Of the $57 million that defendant loaned to Anatian and/or related entities in June 1996, $33 million was used to retire previous loans to Anatian and his associates. See Anatian Complaint ¶¶ 27, 53. By March 1997, following subsequent loans to Anatian and the use of certain loan proceeds to reduce the outstanding debt, the balance owed to defendant by Anatian and/or the related entities was approximately $41 million, see id. ¶ 75, 80-84.

knowing the Gal-Olivers lacked sufficient collateral for the loan, created sham collateral by falsely valuing the plaintiffs' GSN shares (which they had pledged as collateral) at an inflated amount of $1.59 million. See id. ¶ 61. Thereafter, as part of the fall-out resulting from the Coutts Representatives' alleged failure to honor their commitment to extend further credit to Anatian, the Gal-Olivers defaulted on their loan. See id. ¶¶ 66-70.

These allegations might more naturally be read to describe a fraud on the Coutts Bank than a fraud by it. But assuming arguendo that plaintiffs' allegations, read most favorably to them, make out State claims of fraud, contractual breach, and the like against Coutts, they still fail to state a federal cause of action.

As to the purported federal claims brought under the federal securities laws, those laws are intended "to protect persons who are deceived in securities transactions -- to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something" for an inadequate price. Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984) (Friendly, J.). For that reason, courts have repeatedly rejected attempts, such as those presented here, to transform what are in essence breach of contract claims or breach of fiduciary duty claims only tangentially involving securities into securities fraud claims. See Kramer v. Time Warner Inc., 937 F.2d 767, 776 (2d Cir. 1991) (plaintiff "may not transform [a] state law breach of contract or fiduciary duty action into a fraud claim under the federal securities laws"); Drexel Burnham Lambert Inc. v. Saxony Heights Realty Assocs., 777 F. Supp. 228, 235 (S.D.N.Y. 1991) (dismissing

securities fraud claim amounting to a "contract dispute dressed up in the language of fraud").

Here, the fraudulent misrepresentations on which plaintiffs chiefly rely -- relating to the authority of Coutts Representatives to evade or override Coutts' internal loan requirements and to their failure to make good on their loan commitments, see, e.g., Anatian Complaint ¶¶ 37, 48-49, 67, 71, 75, 85; Gal-Oliver Complaint ¶¶ 21, 31, 46-47 -- do not pertain to any securities involved in a purchase or sale, and can not support a claim for securities fraud. See Chemical Bank, 726 F.2d at 943; Levitiin v. PaineWebber, Inc., 923 F. Supp. 325, 328-329 (S.D.N.Y. 1996). While the alleged misrepresentations regarding the value of plaintiffs' stock pledged as collateral, see, e.g., Anatian Complaint ¶¶ 54, 119; Gal-Oliver Complaint ¶¶ 61, 75, might in some circumstances state a securities fraud, here there is no non-conclusory allegation that the plaintiffs were somehow deceived as to the true value of their own stock. Rather, despite some broad language in the Complaints, the only well-pleaded victim of the alleged misrepresentations is, if anyone, the Coutts home office, and so there is no fraud on the plaintiffs.

Moreover, despite the inordinate length of these Amended Complaints, nowhere do they come close to meeting the particularity requirements of Rule 9(b), Fed. R. Civ. P., e.g., that allegations of fraud must specify (1) the statements alleged to be fraudulent, (2) the speaker, (3) where and when the statements were made, and (4) why the statements were fraudulent. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). Nor do they meet the particularity and intent requirements imposed by the Private

Securities Reform Act of 1995. See, e.g., In Re Baesa Securities Litigation, 969 F. Supp. 238, 242 (S.D.N.Y. 1997). Given the length of the Complaints and the fact that plaintiffs have previously amended them, it cannot be reasonably supposed that plaintiffs could cure these deficiencies through further amendments.

Accordingly, the securities fraud claims must be dismissed with prejudice. The RICO claims, suffering from similar Rule 9(b) infirmities, must likewise be dismissed. Moreover, with respect to the RICO claims premised on section 1962(c), plaintiffs have failed to allege a RICO "enterprise" that is sufficiently distinct from the RICO "person" to state a claim under that provision. See Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063 (2d Cir. 1996).

Finally, as to the Anatian plaintiffs' request for a declaration that their loan agreement with Coutts is unenforceable because in violation of Regulation U, 12 C.F.R. § 221.3(a), that regulation applies only to loans made for the purpose of purchasing or carrying securities, see Freeman v. Marine Midland Bank, 494 F.2d 1334, 1338 (2d Cir. 1974), whereas, as plaintiffs now concede, the Anatian loans were for the purpose, directly or indirectly, of purchasing assets, chiefly the television stations, see Plaintiffs' Brief at 26; see also Anatian Complaint ¶¶ 37, 53d, 73.[3]

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[3] While the Anatian Complaint does allege that a portion of the loans was temporarily to be used to purchase stock in another of Anatian's own enterprises, USA Detergents, see Anatian Complaint ¶¶ 60-61, they go on to allege that this

Having dismissed all of the plaintiffs' federal claims, the Court turns to the state claims. As to the state claims in the Gal-Oliver Complaint (which does not allege diversity of citizenship), the Court declines to exercise pendent jurisdiction. See 28 U.S.C. § 1967(c); Morse v. Univ. of Vermont, 973 F.2d 122, 127 (2d Cir. 1992). As to the state claims in the Anatian Complaint (which does allege diversity), the Court, upon review of the earlier-filed pending state lawsuit, abstains from the exercise of jurisdiction, since "'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' counsels such abstention." Arkwright-Boston Manuf. Mutual Ins. Co. v. City of New York, 762 F.2d 205, 210 (2d Cir. 1985) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)) (brackets omitted).

In reaching this determination, the Court has considered, inter alia, the factors most typically bearing on the question of such abstention, viz.: (1) the assumption of jurisdiction by either court over any res or property, (2) the inconvenience of the federal forum, (3) the avoidance of piecemeal litigation, (4) the order in which jurisdiction was obtained, (5) whether state or federal law supplies the rule of decision, and (6) whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction. See Colorado River, 424 U.S. at 818; Burnett v. Physician's Online, Inc., 99 F.3d 72, 76 (2d Cir. 1996. While the first two factors are irrelevant in the instant

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was simply for the purpose of putting more money in his pocket to purchase assets, see id. ¶ 61.

context, the other factors are highly relevant, since the lawsuit between the defendant and the Anatian parties earlier filed in New York State court directly or by necessary implication covers virtually all the issues raised by the state claims brought in these federal cases and thus the concurrent pendency of the state and federal actions clearly presents the danger of "duplicative simultaneous litigation," DeCisneros v. Younger, 871 F.2d 305, 308 (2d Cir. 1989), that would "would waste judicial resources," Arkwright, 762 F.2d at 211.

Permitting the issues raised in the Anatian plaintiffs' state law claims to be litigated simultaneously in two fora would inevitably present the possibility of inconsistent disposition of such issues, which "would breed additional litigation on assertions of claim and issue preclusion." Id. Furthermore, while neither court has rendered a decision on the merits of any issue, see DeCisneros, 871 F.2d at 308, the commencement of the state court action by service of a summary judgment motion makes likely a rapid disposition of the claims presented there. Conversely, the motion to abstain in these actions is being considered at the outset of the proceedings, before any discovery has occurred and well before any motion directed to the merits might be anticipated.

Perhaps most tellingly, now that the federal claims of the Anatian plaintiffs have been dismissed, state law provides the rule of decision with respect to the issues raised in the remaining (state law) claims, strongly supporting abstention in favor of the state court action. See id. at 308-309; American Alliance Ins. Co. v. Eagle Ins. Co., 961 F. Supp. 652, 659 (S.D.N.Y. 1997). For the same reason it is clear that the state court action will adequately protect plaintiff'

rights. See Arkwright, 762 F.2d at 211 (state court better situated to decide issues of local and state law).

Accordingly, the Court abstains from the exercise of jurisdiction over the Anatian state law claims, which are dismissed without prejudice to the right of any party to seek to reopen the action as to those claims upon disposition of the state court action. See Burnett, 99 F.3d at 77.

In sum, for the foregoing reasons, both the Gal-Oliver complaint and the Anatian complaint are hereby dismissed. Clerk to enter judgment.

SO ORDERED.

/s/_____
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
August 20, 1998

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed August 25, 1998]

Nos. 97 Civ. 9280 (JSR)
97 Civ. 9492 (JSR)

RACHAMIM ANATIAN, ATIK LLC, CHARLES GUNDY LLC, CHESED LLC KABALLA LLC, KETER LLC, MAMASH LLC, and VAN HARPER LLC,
Plaintiffs,
v.
COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

MORDECHAI GAL-OLIVER and MARGARET GAL-OLIVER,
Plaintiffs,
v.
COUTTS BANK (SWITZERLAND) LTD., f/k/a COUTTS & CO AG,
Defendant.

ORDER

Defendant having moved to dismiss the Complaint or stay the federal actions pursuant to FRCP 12, and the said motion having come before the Honorable Jed S. Rakoff, United States District Judge, and the Court thereafter, on August 20, 1998 having issued its Memorandum Order granting defendant's motion to dismiss the Complaint in both actions and directing the Clerk to enter judgment accordingly, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Order dated August 20, 1998 defendant's motion to dismiss the Complaints in both action be and hereby is granted.

DATED: New York, New York
August 24, 1998

JAMES M. PARKISON
Clerk of Court

By: /s/_____
Deputy Clerk

This document was entered on the filed docket on 8/25/98.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed November 17, 1999]

No. 98-9270

Mordechai Gal-Oliver and	)
Margaret Gal-Oliver,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
Coutts Bank (Switzerland) LTD.	)
formerly knowns as Coutts &	)
Co. Ag.	)
Defendant-Appellee,	)
	)

Karen Grieve Milton
Acting Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of November one thousand nine hundred and ninety-nine.

Present:

Hon. John M. Walker

Hon. Rosemary S. Poolar

CIRCUIT JUDGES,

Hon. Constance Baker Motley,*
DISTRICT JUDGE

A petition for panel rehearing having been filed herein by Mordechai Gal-Oliver and Margaret Gal-Oliver

Upon consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

/s/_____
Beth J. Meador,
Administrative Attorney

---

* The Honorable Constance Baker Motley, Senior United States District Judge of the Southern District of New York, sitting by designation.

Supreme Court, U.S.
FILED
MAR 3 1 2000
CLERK

No. 99-1371

IN THE

Supreme Court of the United States

MORDECHAI GAL-OLIVER, *et al.*,

Petitioners,

v.

COUTTS BANK (SWITZERLAND) LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals erred in affirming the dismissal of Petitioners' alleged federal securities and racketeering claims against Respondent pursuant to Rules 9(b) and 12(b) of the Federal Rules of Civil Procedure, where

(i) the allegations of the dismissed pleading failed to raise a "strong inference" of scienter on the part of Respondent, as required by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), and otherwise failed to comply with the PSLRA's heightened pleading requirements; and

(ii) Petitioners' alleged RICO claims, which were based solely upon their allegations of securities fraud, were not only facially deficient but were also barred by the provisions of the PSLRA mandating that alleged acts of securities fraud no longer constitute "predicate acts" for the purposes of RICO enforcement.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Coutts Bank (Switzerland) Ltd., is wholly owned by Natwest PLC, a publicly held company.

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STATUTORY PROVISIONS INVOLVED

Securities Exchange Act of 1934,
15 U.S.C. § 78u-4

* * *

(b) Requirements for securities fraud actions.

* * *

(2) *Required state of mind.* In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. § 1964

* * *

(c) . . . no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962.

STATEMENT OF THE CASE

This Petition concerns an affirmance by the United States Court of Appeals for the Second Circuit of an order of the United States District Court for the Southern District of New York (Rakoff, J.) dismissing Petitioners' amended complaint pursuant to 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). The affirmance has already been the subject of one petition for writ of certiorari to this Court filed by Petitioners' co-plaintiffs in the action, Rachamim Anatian and several limited liability companies under his control (collectively, the "Anatian Petitioners"). By that prior petition, the Anatian Petitioners had sought review of the affirmance on substantially the same bases as advanced by Petitioners here. *See* "Petition for Writ of Certiorari," Case No. 99-1037. By order dated February 28, 2000, this Court denied certiorari to the Anatian Petitioners.

In support of their present request for a writ of certiorari with respect to the same affirmance, Petitioners have failed to present any "compelling reason" why the Circuit's ruling should be reversed or modified, *see* Supreme Court Rule 10, or any substantive federal issue which would raise the Circuit's disposition "beyond the academic or episodic." *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1954); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"). Petitioners cite no conflicts in the existing federal law regarding the dismissal of federal securities or

racketeering claims, nor do they cite any error in the Circuit's formulations of federal tort principles as they relate to the dismissed claims. Indeed, Petitioners concede that "the Second Circuit issued what, on its face, appears to be a proper statement of law." Petition at 11.

At its heart, the Petition is nothing more than Petitioners' attempt to reargue the Circuit's disposition solely on the basis that the Circuit allegedly made a "deliberate decision" to rule against them, a charge which is at best "sour grapes" and at worst an unfounded accusation of judicial misconduct. As set forth herein, there was nothing in the slightest bit "improper," "collusive" or "shocking" about the Second Circuit's review and interpretation of the record which led to the affirmance. Nor have Petitioners pointed to any error which would have had a material effect on the affirmance. Thus, even if this Court were willing to entertain a reargument of the Circuit's decision, dismissal of the amended complaint at issue would nevertheless remain entirely appropriate. The Petition should therefore be denied.

A. Background

This action involves a $2,000,000 loan made in 1996 by Respondent Coutts Bank (Switzerland) Ltd. f/k/a Coutts & Co AG ("Coutts"), a British private bank, to Mordechai and Margaret Gal-Oliver (collectively, "Petitioners"). Appendix at 11a.[1] The loan to Petitioners (the "Loan") was evidenced by a written "facility letter" issued by Coutts and a promissory note jointly executed by Petitioners. (A 221-222).

---

1. Citations to "Appendix at __a" are to the pages of the Appendix attached to the Petition. Citations to "(A__)" are to the pages of the Joint Appendix filed in the Second Circuit.

Petitioners' repayment obligations under the note were secured by a written security agreement in which Petitioners pledged to Coutts "all assets" held at the bank. (A 218-219).

Upon drawing the full proceeds of the Loan in June 1996, Petitioners maintained $1,000,000 thereof in an interest bearing account at Coutts and accepted $1,000,000 in cash proceeds from the bank. Petitioners used the latter sums to defray their living expenses and to purchase stock in an enterprise known as Global Systems Network, Inc. ("GSN"), of which Mr. Gal-Oliver was Chief Operating Officer.

In June 1997, Petitioners failed to make certain interest payments due to Coutts and thus defaulted on the Loan. In accordance with Petitioners' written pledge, Coutts foreclosed on Petitioners' assets held by Coutts, including Petitioners' GSN shares (the "GSN Shares") which were on deposit with the bank. Thereafter, in August 1997, Coutts initiated a summary collection proceeding against Petitioners in the Supreme Court of the State of New York, County of New York (the "State Court Action") to recover the balance of the Loan outstanding at the time of suit. This summary proceeding ultimately resulted in a judgment entered against Petitioners in the full amount sought by Coutts. That judgment has now been affirmed by the Appellate Division, First Department of the New York State Supreme Court, and rehearing has been denied.

The federal action which is the subject of this Petition arose soon after Coutts commenced the State Court Action, when Petitioners commenced the federal action at issue here (the "District Court Action"). The gravamen of their complaint was that Coutts had allegedly breached certain

oral loan commitments to the Anatian Petitioners which allegedly had a deleterious effect on GSN's ongoing operations. As a result of those alleged breaches by Coutts of its obligations to the Anatian Petitioners, the Petitioners here claimed that they should be forgiven any obligation to repay their Loan. As a means of invoking the subject matter jurisdiction of the federal courts to hear that state law dispute (and to avoid litigating such issues in the State Court Action), Petitioners alleged further that Coutts' failure to follow through with its alleged collateral obligations to the Anatian Petitioners constituted a violation of several federal regulatory statutes, including 15 U.S.C. § 78j, 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and Sections 1962 (a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (the "RICO Statute").

B. The Amended Complaint

Petitioners' amended complaint against Coutts (the "Amended Complaint"), which was the pleading ultimately dismissed by the District Court, is included at pages A 33-A 68 of the Joint Appendix submitted to the Second Circuit. The pleading consists of seven designated causes of action against Coutts. Its *ad damnum* clause requests compensatory and punitive damages from Coutts in excess of $60 million.

In the pleading, Petitioners admitted that they had executed the note and accepted the Loan from Coutts pursuant to the written facility letter. Petitioners further conceded that the Loan was secured by their written pledge of assets held at Coutts, including the GSN Shares. Notwithstanding the existence of these integrated

agreements, Petitioners alleged that certain officers of Coutts (referred to in the Amended Complaint as the "Coutts Representatives") orally represented to them, at some unspecified time, that GSN's stock "would rise precipitously" in value. Petitioners further alleged that they relied upon these representations as to the value of GSN's shares, and not their own familiarity with the company in which Mr. Gal-Oliver served as a principal, when determining whether to accept the $2,000,000 Loan and/or to use $700,000 of the proceeds thereof to purchase the GSN Shares.

Thus, as two claims in the District Court Action (the "10b-5 Claims"), Petitioners alleged that Coutts had intentionally misled them as to the value of the GSN Shares purchased entirely with Coutts' funds. This "fraud" in inducing the purchase of that stock, Petitioners contended, constituted a violation of Rule 10b-5. As two additional claims (the "Civil RICO Claims"), Petitioners alleged that these very same activities to (*i.e.*, an inducement to purchase the GSN Shares) coupled with the use of interstate mails and wires constituted violations of the RICO Statute.

C. The Dispositions Below

Coutts moved before the District Court to dismiss Petitioners' 10b-5 Claims and the Civil RICO Claims on the grounds that neither stated a claim upon which relief could be granted. Coutts also requested that the District Court decline to exercise supplemental jurisdiction to hear any of Petitioners' state law claims alleged in the Amended Complaint. The District Court heard extended oral argument of Coutts' dismissal motion in February 1998. The District

Court thereafter dismissed both the 10b-5 Claims and the Civil RICO Claims with prejudice and without leave to replead and declined supplemental jurisdiction over the remaining claims in deference to the State Court Action. With respect to Petitioners' alleged federal claims for relief, the District Court stated,

> These allegations [of the Amended Complaint] might more naturally be read to describe a fraud on the Coutts Bank than a fraud by it. But assuming *arguendo* that plaintiffs' allegations, read most favorable to them, make out State claims of fraud, contractual breach and the like against Coutts, they still fail to state a federal cause of action.
>
> * * *
>
> Here, the fraudulent misrepresentation on which plaintiffs chiefly rely — relating to the authority of Coutts Representatives to evade or override Coutts' internal loan requirements and to their failure to make good on their loan commitments [to Mr. Anatian] — do not pertain to any securities involved in a purchase or sale, and cannot support a claim for securities fraud. While the alleged misrepresentations regarding the value of plaintiffs' stock pledged as collateral might in some circumstances state a securities fraud, here there is no non-conclusory allegation that the plaintiffs were somehow deceived as to the true value of their own stock. Rather, despite some broad language in the Complaints, the only well-

> pleaded victim of the alleged misrepresentations is, if anyone, the Coutts home office, and so there is no fraud on the plaintiffs.
>
> Moreover, despite the inordinate length of these Amended Complaints, nowhere do they come close to meeting the particularity requirements of Rule 9(b) . . . Nor do they meet the particularity and intent requirements imposed by the Private Securities Reform Act of 1995. Given the length of the Complaints and the fact that plaintiffs have previously amended them, it cannot be reasonably supposed that plaintiffs could cure these deficiencies through further amendments.
>
> Accordingly, the securities fraud claims must be dismissed with prejudice. The RICO claims, suffering from similar Rule 9(b) infirmities, must likewise be dismissed. Appendix at 13a-15a (citations omitted).

On appeal, the Second Circuit affirmed the District Court's dismissal of Petitioners' alleged federal claims, stating as follows:

> Even if plaintiffs' allegations were true, the purported misrepresentations as to the authority of the Coutts representatives to loan money in excess of the bank's lending requirements and the failure to carry out the loan commitment [to Mr. Anatian] do not pertain to the purchase or sale of a security. The district court properly rejected plaintiffs' attempt "to transform what are in essence breach of contract claims or breach of

fiduciary duty claims only tangentially involving securities into securities fraud claims." Plaintiffs' claim that Coutts deceived them by inflating the value of GSN stock in order to extend them more credit falls short of the mark. It is not sufficient to allege fraud in a transaction in which a security is a part. Therefore, we affirm the dismissal of the securities fraud claim.

In addition, we find that Judge Rakoff properly dismissed both the securities fraud and RICO claims for failure to plead fraud with particularity. Alleging that Coutts Bank made a sizeable loan with knowledge that it could not be repaid does not give rise to an inference of fraud. Nor were the RICO predicate acts of mail and wire fraud alleged with sufficient particularity. Even if we were to find that the time and content of those communications met the Rule 9(b) standard, plaintiffs' claim must be dismissed because they failed to allege how those statements were fraudulent. *Id.* at 6a-7a (citations omitted).

REASONS FOR DENYING THE WRIT

A. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER RULE 10b-5

Under the heightened pleading requirements adopted in the PSLRA, a putative securities law claimant must "with respect to each act or omission alleged to violate [the anti-fraud provisions of the Securities Exchange Act of 1934], state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind."

15 U.S.C. § 78u-4(b)(2) (1998) (emphasis added). There can be little doubt that, under this pleading standard, which was intended to heighten the Circuits' existing standards, the Amended Complaint could not support the 10b-5 Claims.

At page 4 of their Petition, Petitioners set forth several facts which form the predicate for those claims:

1) Mr. Gal-Oliver, who was the Chief Operating Officer of GSN, had "few assets."

2) Notwithstanding its knowledge of Petitioners' alleged impecuniousness, Coutts advanced $2,000,000 of its own funds to facilitate, among other things, Petitioners' purchase of $700,000 in GSN Shares.

3) GSN later filed for bankruptcy protection, allegedly as a result of Coutts' non-fulfillment of oral obligations made to the Anatian Petitioners, thereby rendering GSN's stock "virtually worthless." Petition at 4.

Based on these allegations, Petitioners have sought an inference that, at the time Coutts advanced $2,000,000 to them, those officers who allegedly represented to Petitioners that GSN's stock "would rise precipitously" knew that their statements were false. Petition at 16.

As this Court stated in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 596-97 (1986), if a defendant has no "rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference

of a conspiracy." Following this Court's lead, Courts in the Second Circuit have been loathe to draw inferences of scienter which fraudulent or conspiratorial intent "defy logic" or otherwise defy "economic reason." *See, e.g., Shields v. Cititrust Bancorp, Inc.*, 25 F.3d 1124, 1127 (2d Cir. 1994) (dismissed 10b-5 claim was contrary to defendants' "economic self-interest"); *Laro, Inc., v. Chase Manhattan Bank*, 866 F. Supp. 132, 137 (S.D.N.Y.), *aff'd*, 60 F.3d 810 (2nd Cir. 1994).

In this case, despite requests by both the District Court and the Second Circuit, Petitioners failed to offer any explanation as to why their theory of Coutts' behavior made "economic sense." Why would Coutts lend Petitioners $2 million to purchase $700,000 in GSN stock, and obtain a pledge of such stock, if Coutts knew that the stock was overvalued? Clearly, if Coutts wanted to obtain the stock for its own account, it could have purchased the GSN Shares for far less than the very dear price of $2 million. Nor is it reasonable to infer that Coutts risked its own funds to earn relatively insignificant interest and fees on the Loan. *See, e.g., Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). The lack of any rational basis to infer that Coutts in fact advanced the Loan as a means of obtaining the GSN Shares for less than fair consideration led both the District Court and the Second Circuit to conclude that, if Petitioners had any claims against Coutts regarding an alleged "Coutts Commitment" to the Anatian Petitioners, such claims were for common law breach of contract, not securities fraud. Appendix at 6a, 13a-14a. In that regard, the courts have universally held that the failure to carry out a promise in connection with a securities action is a breach of contract, not a fraud. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993) (failure to carry

out promise in a securities transaction is normally a breach of contract and not a fraud); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 776 (2d Cir. 1991) (collecting cases; plaintiff cannot transform state law breach of contract or fiduciary duty claim into securities fraud claim); *cf. Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (breach of fiduciary duty, without more, does not constitute violation of Rule 10b-5).

B. THE AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR RELIEF UNDER THE RICO STATUTE

The alleged basis for Petitioners' Civil RICO claims appeared in paragraph 119 of the Amended Complaint:

> Coutts entered into a scheme to defraud Plaintiffs, as set forth in detail at paragraphs 37, 48-50, 54, 67 and 70, above. In particular, in order to induce Plaintiffs to sign the Facility Agreements, to pledge stock to Coutts, and to pay the interest differential, Coutts represented to Plaintiffs it would make the loans, described and represented as the Coutts Commitment, to the seven LLCs; that the New York Office of Coutts had the authority to make such loans and to release the funds thereunder to Plaintiffs without the consent of any other entity or person, including, but not limited to the London office of Coutts; and that that the [GSN Shares] had a value far greater than its actual value.

(A 57). The Amended Complaint further contained "boilerplate" allegations that Coutts mailed account statements to Borrowers and made telephone calls to them

to "confirm" the "frauds" (A 58); that the "foregoing" predicate acts constitute the required "continuity plus relationship" (A 59); and that Coutts may engage in other and further illicit "business practices" in the future. (*Id.*). As to these claims, the Second Circuit affirmed their dismissal "for the reasons set forth in the District Court," *i.e.*, for failure to state a claim for relief with the particularly required by FRCP 9(b). Appendix at 7a.

Petitioners' sole basis for challenging the affirmance is their feigned "shock" that the Circuit dismissed "claims under Section 1962(c)," which Petitioners now purport to have abandoned in their appeal to the Circuit. Petition at 12. Even assuming that Petitioners had in fact abandoned that claim, the "error" of the Second Circuit in no way impacts Petitioners' failure to plead a federal claim for relief under the RICO Statute. The only alleged "predicate act" which pertains specifically to Petitioners' case is their allegation that Coutts "misrepresented" "that the [GSN Shares] had a value far greater than [their] actual value." (A 57). Yet, securities fraud is clearly no longer cognizable as a predicate act for purposes of a civil RICO claim. Section 1964(c), as amended in the PSLRA, expressly states that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962." *See* 18 U.S.C. § 1964(c) (1999).[2]

2. Petitioners' Civil RICO Claims were hopelessly insufficient in other material respects. For example, the Amended Complaint summarily alleged that Coutts was an "enterprise" under 18 U.S.C. §§ 1961(4), 1962. (A 56). The mere allegation that Coutts engaged in "fraud" in the conducting of its operations did not, however, transform Coutts into an "enterprise." *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. (Cont'd)

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONERS LEAVE TO REPLEAD THEIR FEDERAL TORT CLAIMS

The only other "error" addressed in the Petition is whether the District Court abused its discretion by denying Petitioners leave to replead their facially defective federal claims. In that regard, this Court has held that district courts have sound discretion to grant or deny leave to replead a dismissed complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Whether or not leave to replead has been requested, the "futility" of any further amendments clearly constitutes a valid ground for district courts to deny leave to replead or amend. *Id.* at 1802; *F.D.I.C. v. Bathgate*, 27 F.3d 850, 874-75 (3d Cir. 1994); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 226 (8th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996, 1006 (6th Cir.), *cert. denied*, 510 U.S. 1119 (1993). In denying leave to replead in this case, the District Court was

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(Cont'd)

1994) (RICO violation insufficiently alleged where the enterprise "consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant"). Nor did the Amended Complaint establish a "pattern" of activity on the part of Coutts. In the end, the "frauds" alleged against Coutts, even if true, were part of a single transaction with a finite purpose and with no threat of continuity against Petitioners or anyone else. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (RICO statute requires at least two acts of racketeering); *H. J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989). Nor was there any basis for inferring that the predicate acts alleged by Petitioners, namely "mail" or "wire fraud," would continue unabated. *GICC Capital Corp. v. Technology Fin. Group*, 67 F.3d 463, 466 (2d Cir. 1995) ("It defies logic to suggest that a threat of continued looting exists when, as plaintiff admits, there is nothing left to loot").

not faced with a party's inadvertent omission of a few material allegations from its pleading or the inartful drafting of a claim. (Petitioners could hardly be accused of leaving anything out of their Amended Complaint.) Rather, as set forth herein, the hundreds of allegations in the Amended Complaint, even if true, simply did not give rise to claims for relief under the federal securities laws or the RICO Statute. The District Court specifically noted that the Amended Complaint, although "inordinately long," did not "come close" to meeting the exacting pleading requirements of the PSLRA or FRCP 9(b). Appendix at 14a. Nor would Petitioners ever "come close" to creating a federal fraud with allegations of a $2,000,000 loan made to an officer of a corporation to facilitate the purchase of $700,000 in overvalued stock in that corporation. As such, both the Second Circuit and the District Court were correct in concluding that it could not "be reasonably supposed" that leave to replead would cure the myriad of deficiencies in the Amended Complaint.

CONCLUSION

As set forth above, Petitioners have highlighted nothing in the Second Circuit's affirmance which represents in any way a departure from well-established legal principles regarding the dismissal of conclusory allegations of securities fraud and racketeering. Thus, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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